92-1279

No.

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

JOEL M. BERGER,

*Petitioner*,

v.

BOARD OF REGENTS OF THE STATE OF NEW YORK, NEW YORK STATE DEPARTMENT OF EDUCATION, and THOMAS SOBOL as Commissioner of Education of the State of New York,

*Respondents*.

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION, THIRD DEPARTMENT

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## ISSUES PRESENTED FOR REVIEW

1. In an administrative proceeding to revoke the license of a professional licensee, does an accused's right to notice of the charges against him, secured by the Due Process Clause of the Fourteenth Amendment, prohibit the State from changing the factual basis of the charge *after* trial and without notice?

2. Is there a need for authoritative guidance from this Court, on the extent to which a State may depart from the statement of charges in revoking the license of a professional licensee, where the States differ in the application of the Due Process guarantee of notice in this respect, and where this Court has not addressed the issue for almost 25 years since *In re Ruffalo*, 390 U.S. 544 (1968) (post-trial amendment of charges violates Due Process), except for a cursory 2-page discussion 7 years ago at the end of a decision addressing other, non-notice issues?

## PARTIES BELOW

There has been no change in the parties before this Court.

Petitioner in this Court was respondent before the administrative agency which revoked his license and was petitioner and appellant in the Courts below where he sought to annul the revocation of his license.

Respondents in this Court were respondents in the Courts below.

In the administrative agency, petitioner was prosecuted by the New York State Office of Professional Discipline ("OPD"). OPD was not a party in the Courts below because, upon petitioner's conviction, the administrative agency itself became the real party in interest/respondent before the Courts below.

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

Petitioner hereby submits his petition for a writ of certiorari to the Supreme Court of the State of New York, Appellate Division, Third Department.

## INTRODUCTION

Petitioner is a nationally-known dentist whose license to practice dentistry was revoked following his involvement in the controversy over the danger/safety of mercury-silver dental fillings. Petitioner was tried on one set of charges and then convicted on another. At trial, petitioner mounted a strong defense, using new scientific evidence showing the dangers of mercury-silver dental fillings. As a result, the State changed the charges *after* trial without notice to petitioner. Petitioner suffered the permanent revocation of his dental license.

In the proceedings below, petitioner timely invoked his right to notice of the charges against him, guaranteed by the Due Process Clause of the Fourteenth Amendment to the Constitution. Petitioner invoked *In re Ruffalo*, 390 U.S. 544 (1968) (change of charges after trial in administrative disciplinary proceeding violates Due Process). The New York Appellate Division rejected petitioner's constitutional challenge. The New York Court of Appeals declined to review it.[1]

Certiorari is appropriate on 3 levels: (1) New York's resolution of the constitutional issue was inconsistent with prevailing decisions on the same issue in numerous State and federal

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[1]In New York, the Appellate Division, Third Dept., has exclusive and virtually final review of licensing disciplinary proceedings against numerous professionals through a statutory grant of exclusive jurisdiction. N.Y. Educ. Law § 6510(5).

courts outside New York; (2) New York's resolution of the constitutional issue was a serious departure from this Court's controlling precedent; and (3) authoritative guidance is warranted from this Court which has not addressed the Due Process issue of notice in administrative-disciplinary proceedings in the 25 years since *Ruffalo*, except for a cursory 2-page discussion 7 years ago at the end of an opinion which concentrated on other, non-Due Process issues.

There are thousands of administrative disciplinary proceedings brought annually in State and federal agencies. After 25 years since *Ruffalo*, an authoritative pronouncement from this Court is appropriate, in light of New York's departure from this Court's precedent and from the prevailing decisions in other jurisdictions.

## OPINIONS AND ORDERS BELOW

### 1. The administrative agency

The hearing panel found petitioner guilty of the original charges and recommended revocation of his license. The findings of the hearing panel are not reported. Its findings are dated July 19, 1989 and are included in the appendix at A.16–19.

The Regents Review Committee (intermediate level of administrative review) also found petitioner guilty, but of different charges from those raised in the formal statement of charges and from those used by the hearing panel. The Regents Review Committee first raised its new charges—and convicted petitioner of them—*after* the trial was over (during the internal administrative appeal). The findings of the Regents Review Committee are not reported. Its findings are dated March 9, 1990 and are included in the appendix at A.13–15.

On final administrative review, the Board of Regents adopted the new post-trial charges of the Regents Review Commit-

tee. The Board of Regents revoked petitioner's license to practice dentistry. The order of the Board of Regents is not reported. It is dated April 18, 1990 and is included in the appendix at A.11–12.

**2. The Courts below**

New York's Appellate Division, Third Department, affirmed the revocation order of the Board of Regents. Its decision is reported. *Berger v. Board of Regents*, 178 A.D.2d 748, 577 N.Y.S.2d 500 (3d Dept. 1991). It is included in the appendix at A.5–10.

New York's highest court, the Court of Appeals, dismissed petitioner's appeal on the ground that "no substantial constitutional question is directly involved". *Berger v. Board of Regents*, 79 N.Y.2d 977, 583 N.Y.S.2d 194 (1992). Its order is in the appendix at A.1.

The New York Court of Appeals denied rehearing and denied petitioner's alternative request for discretionary leave to appeal. Its order will appear in the official reporters in due course. *Berger v. Board of Regents*, __ N.Y.2d __, ___ N.Y.S.2d ___ (1992). Its order is in the appendix at A.3–4.

## JURISDICTION OF THIS COURT

Petitioner seeks review of a final judgment of the New York Supreme Court, Appellate Division, Third Department, wherein petitioner specially set up and claimed a right under the U.S. Constitution. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

This petition is timely. Petitioner timely appealed from the N.Y. Appellate Division to the N.Y. Court of Appeals, New York's highest court. The N.Y. Court of Appeals dismissed the appeal on the ground that "no substantial constitutional question is directly involved," on April 7, 1992 (A.1). Petitioner

timely sought rehearing and, alternatively, sought discretionary leave to appeal.[2] The N.Y. Court of Appeals denied both rehearing and discretionary leave to appeal on Sept. 22, 1992 (A.3–4). Petitioner timely files this petition within 90 days of the rehearing and discretionary-leave denials. Sup.Ct.R. 13.1, 13.4.

The Eleventh Amendment to the Constitution does not bar this Court's jurisdiction. The Eleventh Amendment, which bars federal-court jurisdiction of private actions against States and State agencies, applies only to actions brought in federal court in the first instance, not to State-court actions reviewed in this Court. Petitioner properly brought his proceeding in the State courts and seeks review here of a final judgment of the State court of last resort. *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 31 (1990) ("The Eleventh Amendment does not constrain the appellate jurisdiction of the Supreme Court over cases [against state agencies] arising from state courts").

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[2]The motion for rehearing, and alternatively for discretionary leave to appeal, was served June 10, 1992 which was timely. The 30-day period for seeking rehearing (22 NYCRR § 500.11(g)(3)) did not begin to run until respondents served notice of entry of the dismissal order. *Park East Corp. v. Whalen*, 38 N.Y.2d 559, 381 N.Y.S.2d 819 (1976) (consistency under New York practice requires service of notice of entry to begin time periods). Similarly, the 30-day period for seeking discretionary leave (N.Y.Civ.Prac. L.&R. 5513(b)) did not begin to run until the dismissal order (N.Y.Civ. Prac.L.&R. 5514(a)) was served with notice of entry. *Park East Corp., supra*, 38 N.Y.2d at 560, 381 N.Y.S.2d at 820 (time for seeking discretionary leave to appeal, after dismissal of appeal, begins to run upon service of notice of entry of dismissal order).

These 30-day periods were further extended 5 days (total 35 days) because respondents served notice of entry by ordinary mail. N.Y.Civ.Prac. L.&R. 2103(b)(2); *Cappiello v. Cappiello*, 66 N.Y.2d 107, 108–09, 495 N.Y.S.2d 318, 320 (1985) (adding 5 days where respondent serves notice of entry by ordinary mail).

Respondents served notice of entry of the dismissal order by mail on May 6, 1992 (A.2), allowing 35 days until June 10, 1992 for petitioner to seek rehearing and discretionary leave, which petitioner did timely.

## CONSTITUTIONAL PROVISION

Section 1 of the Fourteenth Amendment to the U.S. Constitution provides, in part:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

## STATEMENT OF THE CASE

Petitioner was a licensed dentist in New York for 30 years who became involved in the controversy over the dangers/safety of mercury-silver dental fillings. The State accused and tried him on one set of charges and then convicted him of another: After trial, the administrative agency changed the charge against petitioner because of the substantial scientific evidence received on petitioner's behalf. The administrative agency revoked petitioner's license to practice dentistry.

In the Courts below, petitioner timely invoked his Due Process right to notice of the charges against him, to no avail. The New York Appellate Division rejected petitioner's Due Process challenge, and New York's highest court declined to review it.

Petitioner timely seeks certiorari. New York's resolution of this fundamental issue differs from those in numerous other States and federal circuits. This Court has not given its comprehensive guidance on this issue in the almost 25 years since *In re Ruffalo, supra*, 390 U.S. 544 (1968).

## 1. Background: The Controversy Over the Danger/Safety of Mercury-Silver Dental Fillings

The controversy over the safety of mercury-silver dental fillings has split the dental profession. Mercury is extremely toxic, but is used in dental fillings as a bonding agent because it produces a malleable mixture which is easy for dentists to insert. Traditionally, mercury within dental fillings was thought to remain harmless and inert, bound in the mixture which formed the filling. However, recent scientific literature shows the opposite: that friction from chewing or brushing teeth disburses toxic mercury from the fillings to the lungs, brain, kidneys, bloodstream, and to the unborn fetuses of pregnant women (mercury passes through the placenta).

This controversy has split the dental profession. Growing numbers of dentists are refusing to use mercury fillings and, in certain cases, are advocating their removal from patients showing high amounts of oral mercury. On the other side, the conventional authorities within dentistry, including the American Dental Association ("ADA"), maintain that mercury fillings are supposedly safe, notwithstanding the new scientific literature. This controversy increasingly has found its way into regulatory proceedings against new-school dentists.

Petitioner was charged with fraud, practicing beyond the scope of dentistry, gross and ordinary negligence and incompetence, and numerous other violations arising out of his removal of a single patient's mercury-silver fillings at the patient's request. The fee was $500 for removing and replacing 14 mercury-silver fillings including follow-up care, which required several visits. The replacement fillings were a plastic resin, manufactured for dental use by the 3-M Corp. One of the replacement fillings bothered the patient who complained to the ADA which, in turn, assisted the New York authorities in bringing charges against petitioner.

## 2. The Formal Charges and Trial

The formal statement of charges against petitioner was specific: It focused on the bona fides of testing for oral mercury and of removing mercury fillings for safety reasons, as well as on certain alleged statements and guarantees made to the patient (A.20–21). The charges accused petitioner of:

> perform[ing] tests for mercury vapor and electric current in the patient's mouth [and of telling] the patient . . . that mercury was toxic in amounts smaller than those measured, and that when she chewed food she was poisoning herself because the mercury in the amalgam [mercury] fillings in her mouth was toxic and was released in small doses. [Petitioner] recommended the replacement of all the patient's existing amalgam [mercury] fillings, and told her that in one month her arm and leg pain would be improved slightly and that in six months it would be much better. [Petitioner] subsequently removed and replaced ten [sic] fillings in said patient's mouth.

(Formal statement of charges; A.21).

The prosecutor's opening statement at trial also focused exclusively on the bona fides of removing mercury fillings for safety reasons. The prosecutor opened:

> . . . The department alleges that in April of 1984 [patient J.H.] went to Dr. Berger after seeing him on TV and hearing him on the radio advocating the removal of amalgam [mercury] fillings due to the alleged toxicity of the mercury contained in the fillings. Dr. Berger performed tests for mercury vapor and electric current in her mouth at which time he recommended the removal of her amalgam [mercury] fillings. The fillings were subsequently removed. . . .

> You will hear testimony from the department's expert witness Dr. Baratz who will shed some light on the appropriateness of removing amalgam [mercury] fillings [for safety reasons].

(Prosecutor's opening statement; A.25–26).

As shown, the charges and prosecutor's opening at trial focused exclusively on the legitimacy of petitioner's practice of testing for oral mercury and removing mercury fillings, as well as on certain statements allegedly made to the patient. The charges and opening focused on the "alleged toxicity of mercury contained in the fillings" and "the appropriateness of removing amalgam [mercury] fillings [for safety reasons]" (A.26).

As a result, petitioner defended exclusively on these issues at trial. Petitioner offered reams of scientific evidence showing the dangers of dental mercury and the legitimacy of his dental practice in removing mercury fillings (see, e.g., A.32–41). The trial, which lasted 6 days and covered 732 pages of transcript, focused on mercury's danger/safety in dental fillings and on the bona fides of the new-school practice of avoiding and removing mercury dental fillings for health reasons.

### 3. Report of the Hearing Panel—Conviction Under the Original Charges

The hearing panel found petitioner guilty on all counts and recommended the revocation of his license (A.18–19). The hearing panel found that there was no scientific basis for petitioner's dental practice (despite reams of scientific literature supporting it, A.32–41) and found that petitioner allegedly had made certain guarantees (A.17 ¶6). The hearing panel disregarded the substantial scientific evidence offered by petitioner (A.32–41). The hearing panel issued its report on July 19, 1989 (A.19).

### 4. Internal Review Within the Administrative Agency—Departure from the Original Charges

On review within the administrative agency, the Regents Review Committee (intermediate level of administrative review) took a different approach. The Regents Review Committee expressly avoided the issue of mercury's danger/safety (the issue in the charges) and, for the first time, raised a *new* charge against petitioner: that because of *this particular patient's* fragile medical history, petitioner should have consulted a medical doctor before subjecting *this particular patient* to the strain of removing her dental fillings (A.13,15).

The Regents Review Committee was explicit in avoiding the broader mercury issue at trial, and in substituting a new charge against petitioner. The Regents Review Committee stated:

> It is our unanimous opinion . . . that [petitioner] was treating a medical problem and that, *given this patient's medical history*, medical intervention should have been obtained in this matter prior to any dental procedure being performed on the patient (see transcript pages 63–64 [A.28–29]). In this regard, *we do not pass upon* the medical issue of whether, in general, fillings containing mercury are harmful to the human body and should be removed.

(Regents Review Committee report; A.13,15; emp. added). Thus the Regents Review Committee expressly avoided the issue of mercury's danger/safety (the issue addressed at trial) and instead focused on a new issue—whether medical intervention was necessary *for this particular patient* "given this patient's [fragile] medical history" (A.13,15).

Petitioner *never* had notice that *this particular patient's* fragile medical history (or the alleged need for a doctor for this patient) was the factual basis of the charge at trial. The formal statement of charges and the trial had focused on the bona

fides of removing mercury fillings for safety reasons and on certain alleged guarantees (A.20–24). The same is true of the prosecutor's opening statement at trial (A.25–26). At no time before or during trial was petitioner given notice that he was being charged with/tried for failure to seek medical supervision for *this particular patient* "given this patient's [fragile] medical history" (A.13,15). This new issue first arose at the administrative-review level, *after* the trial was concluded. *Id.*

The Regents Review Committee purported to justify its departure from the mercury issue by citing 2 pages of testimony at trial (quote at p. 9, *supra*, citing A.28–29). In these 2 pages the prosecutor asked the State's expert witness whether a medical doctor should have been called in this situation (A.28–29). However, there was no indication that this cursory 2-page query, buried in a 732-page trial transcript, was the focus of any charge against petitioner. The State did not elaborate on this 2-page query, nor did the State indicate that this 2-page inquiry was the focus of the charges, nor did it amend the charges at any time.

With this new charge, the Regents Review Committee softened its blow in one respect: It recommended a 2-year suspension of petitioner's license, rather than the revocation recommended by the hearing panel (A.13,15). The Regents Review Committee issued its report on March 9, 1990 (A.13,15).

### 5. Final Administrative Review—Revocation Order by the Board of Regents

Two weeks later, on March 23, 1990, the Board of Regents acted (A.11–12). The Board of Regents adopted the findings of the Regents Review Committee (guilt on the new post-trial charge of failing to call a doctor for this particular patient) but increased the penalty. Instead of the 2-year suspension recommended by the Review Committee, the Board of Regents revoked petitioner's license outright (A.11–12). The Board of

Regents issued its revocation order on April 18, 1990 (A.12).

Thereafter petitioner sought appellate review in the New York courts (pp. 11–13, *infra*).

### 6. Petitioner timely raised the Due Process issue before the State tribunals

Petitioner raised his Due Process claims consistently. In the Appellate Division (court of first instance),[3] petitioner raised his Due Process claim at p. 52 of his main brief and pp. 5–7 of his reply brief. In his main brief, petitioner argued:

> Dr. Berger was not given reasonable notice of the new charge. It was asserted for the first time *after* trial at the Regents Review Committee [A.15]. This violates [N.Y.] Education Law § 6510(1)(d) and the due process clauses of the U.S. and State Constitutions. *Ruffalo, supra*, 390 U.S. at 550 ("procedural due process . . . includes fair notice of the charge") . . . .

(Pet. main br. in N.Y. App. Div. at 52; emp. in orig.). Petitioner made similar arguments at pp. 5–7 of his reply brief in the Appellate Division.

The Appellate Division addressed the issue and resolved it against petitioner (A.5,7–8; *Berger v. Board of Regents, supra*, 577 N.Y.S.2d at 503). The Appellate Division held that petitioner had notice that his failure to obtain a medical doctor for the patient was the basis of the charge, because it was addressed by both sides' witnesses at trial. *Id.* However, as mentioned above, it was addressed only cursorily, as a side issue: It occupied a mere 4 pages (A.27–31) of a 732-page trial transcript which otherwise focused on the dangers/safety of mercury fillings generally. The Appellate Division ignored the

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[3]Under New York law, the Appellate Division, Third Dept., is the court of first instance. N.Y. Educ. Law § 6510(5).

microscopic and fleeting nature of the trial testimony within these 4 pages (see pp. 17–18, *infra*).[4]

The Appellate Division's resolution of the notice issue is itself an independent basis to support this Court's jurisdiction. *Cohen v. Cowles Media Co.*, 111 S.Ct. 2513, 2517 (1991) (resolution of federal issue by State appellate court itself confirms Supreme Court jurisdiction on writ of certiorari).

Beyond the Appellate Division, petitioner continued to preserve the point. On appeal to the New York Court of Appeals, New York's highest court, petitioner made the same argument under the Fourteenth Amendment's Due Process Clause. In response to the Court's Jurisdictional Inquiry, petitioner asserted:

> The requirement of Due Process of Law under both the U.S. and State Constitutions entitles appellant to fair notice of the charges against him. *In re Ruffalo*, 390 U.S. 544, 550 (1968) ("procedural due process . . . includes fair notice of the charge"). . . . Fair notice was not given here. The basis of the charge against appellant was changed *after* the hearing was closed [recitation of above facts].

(Pet. Response to Juris. Inquiry in N.Y. Ct. App. at 18; emp. in orig.).

The N.Y. Court of Appeals summarily dismissed the appeal on the ground that "no substantial constitutional question is directly involved" (A.1; *Berger v. Board of Regents, supra*, 79 N.Y.2d 977, 583 N.Y.S.2d 194 (1992)).

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[4]Although the Appellate Division did not mention that petitioner had invoked a *federal* right to fair notice under the U.S. Constitution, in fact petitioner did so, asserting his *federal* constitutional claim in both his main and reply briefs in the Appellate Division, with citations to this Court's decision in *Ruffalo, supra*, 390 U.S. at 550 (Due Process prohibits post-trial amendment of charges). (Pet. main br. in N.Y. App. Div. at 52; pet. rep. br. in N.Y. App. Div. at 6–7.) *See also* quotation from pet. main brief in Appellate Division, at p. 11, *supra*.

Petitioner timely sought rehearing in the N.Y. Court of Appeals, with an alternative request for discretionary leave to appeal. Petitioner again raised the same Due Process issue under the Fourteenth Amendment (Pet. Statement in Support of Rearg. and Leave to Appeal, at 13–17; Pet. Reply Statement in Support of Rearg. and Leave to Appeal, at 1–5).

The N.Y. Court of Appeals denied both rehearing and discretionary leave to appeal (A.3–4). The N.Y. Court of Appeals entered this final order on Sept. 22, 1992 (A.3–4).

## REASONS FOR ALLOWANCE OF THE WRIT

In the present case, resulting in revocation of petitioner's license to practice dentistry, the New York Courts departed from the fundamental safeguard of giving fair notice to petitioner of the charges against him, in a serious departure from this Court's precedent under the fair-notice component of the Due Process Clause, and in variance with the results reached in numerous State and federal courts, on an important constitutional issue which this Court has not addressed in a comprehensive fashion for 25 years.

There are thousands of administrative disciplinary proceedings brought annually in State and federal agencies. The consequences may be extreme, as for the present petitioner who lost his license and livelihood.

It is time for authoritative guidance from this Court on this important issue, to ensure uniformity, continuity and fairness in the constitutional guarantee of fair notice in administrative disciplinary proceedings.

## 1. The New York Procedure Deprived Petitioner of Fair Notice of Charges, in Violation of the Due Process Guarantee of the Fourteenth Amendment

### a. Due Process Requires Fair Notice of the Factual Basis of the Charge

In an administrative disciplinary proceeding, Due Process of Law requires fair notice of the charges, so that the accused has a fair opportunity to prepare a defense and to meet the evidence against him. *In re Ruffalo, supra*, 390 U.S. at 550 (in State disciplinary proceeding, "procedural due process . . . includes fair notice of the charge"). This requires that an accused be informed *both* of the law or regulation which he/she is accused of violating *and* of the factual basis for the alleged violation. *Id.*, at 550–51 (Due Process violated where accused not given prior notice of facts constituting the alleged offense); *see also Bowman Transp. v. Arkansas-Best Freight System*, 419 U.S. 281, 288n.4 (1974) (in an administrative proceeding, Due Process requires that an accused "be *apprised of the factual material* on which the agency relies . . . so that he may rebut it"; emp. added).

The latter is essential. The right to notice of charges would be hollow if an accused were notified only of the law or regulation which allegedly was violated. The notice also must specify the *factual basis* for the alleged violation. *Id.* Otherwise, an accused would be left without notice of the acts which he must explain or deny. Mere incantations of law, without a factual basis for an alleged violation, give effectively no notice at all. It is essential that the accused be "apprised of the factual material on which the agency relies". *Bowman Transp., supra*, 419 U.S. at 288n.4.

### b. The New York Procedure Does Not Comply

The New York procedure is deficient. New York essentially permits "notice" of the factual basis of the charges to be given

at the intermediate review level (Regents Review Committee: A.13,15) *after* the trial is over. It was at this point that petitioner received notice, for the first time, that the basis of the charge against him was his failure to call a medical doctor for this particular patient "given this patient's [fragile] medical history" (A.13,15). At this point, the trial was over; the record was closed. There was no opportunity for petitioner to adduce evidence in response to this new basis, including evidence showing that a medical doctor was unnecessary.

The prior proceedings did not give petitioner fair notice of the factual basis of the charges. Neither the formal statement of charges (A.20–24) nor the prosecutor's opening statement at trial (A.25–26) ever mentioned or suggested that petitioner was being charged with failure to call a medical doctor for the present patient in light of her special medical history. Rather, both focused on different matters—on the bona fides of testing for oral mercury and of removing mercury fillings, along with alleged guarantees (charges at A.20–24; opening at A.25–26).

The first mention of the new basis for the charge came at the Regents Review Committee (A.13,15), the intermediate review stage within the agency, after the trial. Petitioner was not "apprised of the factual material on which the agency relies . . . so that he may rebut it". *Bowman Transp., supra*, 419 U.S. at 288n.4.

### (i) The Severe Prejudice to Petitioner

The prejudice to petitioner was severe. Petitioner responded to the original charges by mustering scientific literature to show the bona fides of his practice—that testing for oral mercury and removing mercury fillings were supported by increasing scientific literature showing the health dangers of mercury in dental fillings (A.32–41). Petitioner had no notice that he was to justify his not calling a medical doctor for patient J.H. "given this patient's medical history" (A.13,15).

As a result, petitioner omitted substantial evidence showing that a medical doctor for J.H. was unnecessary: Petitioner did not call an expert on that point;[5] petitioner did not subpoena J.H.'s medical records; and petitioner did not subpoena patient J.H. herself (she never testified). Petitioner could have done all this, and more. Yet petitioner had no notice that this was necessary because the new basis of the charge (the alleged need for a medical doctor for J.H. "given this patient's medical history", A.13,15) was not revealed to petitioner until the administrative review level, long *after* the trial was over (A.13,15; pp. 9–10, *supra*).

### (ii) The Illusory Distinction Between Charges vs. Basis for Charge

In the Courts below, respondents argued that petitioner was not prejudiced, reasoning that the new basis invoked by the Regents Review Committee was not a "new charge" but instead was only a "factual basis" for the existing charge. This purported distinction is not availing.

As mentioned above, fair notice of the charges required prior notice not only of the laws allegedly violated, but also of the *factual basis* of the alleged violation (p. 14, *supra*; *Ruffalo, supra*, 390 U.S. at 550–51; *Bowman Transp., supra*, 419 U.S. at 288n.4). Without the latter, petitioner is left to guess at what facts or circumstances the prosecution will prove and cannot meaningfully prepare a defense. Respondents' argument in the Courts below, that they merely withheld the "factual basis" for the charge, does not save their procedure. *Id.*; *see also* p. 14, *supra*.

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[5]See pp. 17–18, *infra*, discussing the cursory inquiries of the parties' mercury experts concerning the special medical needs of patient J.H. There was no focus by either side on the special needs of patient J.H., until the Regents Review Committee underscored it *after* the trial (A.13,15).

### (iii) No Fair Notice in the Mere Introduction of 4 Pages of Evidence

The New York Appellate Division held that petitioner had been given fair notice at trial because both sides' experts had addressed an alleged need to call a doctor for J.H. in light of her special medical history (A.5,7–8; *Berger v. Board of Regents, supra*, 577 N.Y.S.2d at 503; referring to testimony at A.27–31). The Appellate Division held that this constituted fair notice of the basis of the charge. *Id.*

The Appellate Division's holding is meritless. The trial transcript shows that the issue of J.H.'s special needs was addressed only tangentially—in 3 pages with a 1-page rebuttal (A.27–31). It was buried in a 732-page trial transcript which otherwise concentrated on the general bona fides of testing for oral mercury and of removing mercury fillings. There was no indication from these 4 pages of testimony—nor from the formal charges nor the prosecutor's opening—that petitioner's failure to call a medical doctor for J.H.'s special medical condition was a basis of the charge.

The liberal evidentiary rules at trial further support this conclusion. The normal rules of evidence do not apply: Hearsay and evidence of de minimis relevance are received. N.Y. Educ. Law § 6510(3)(c) ("The [hearing] panel shall not be bound by the rules of evidence"). This evidentiary informality further refutes any contention that the mere introduction of evidence somehow gives notice to an accused of the basis of the charge.

This Court's recent holding in *U.S. v. Felix*, 112 S.Ct. 1377 (1992), further underscores the point. In *Felix* this Court rejected any attempt to define the scope of the charge by the mere introduction of evidence: This Court held that the mere receipt of evidence of conduct is *not* the equivalent of prosecution for that conduct. This Court was explicit:

> [It is a] basic, yet important, principle that the introduction of relevant evidence of particular misconduct in a case is not the same thing as prosecution for that conduct.

*U.S. v. Felix, supra*, 112 S.Ct. at 1383 (1992). The Appellate Division's reliance upon the mere introduction of evidence (4 pages of testimony within a 732-page transcript) to show the conduct for which petitioner was prosecuted, is meritless and contravenes this Court's recognition in *Felix*.

*Felix* applies here, even though it involved double jeopardy. The concerns of the Double Jeopardy clause overlap with those of the right to notice: Both need to identify the conduct for which an accused is being prosecuted (in one case, to determine whether an accused has fair notice of the charge; in the other, to determine whether an accused is being re-tried illegally). *Felix* holds that the mere introduction of evidence cannot define the conduct for which an accused is being prosecuted—a salutary proposition with as much force under the fair-notice component of the Due Process clause as under the Double Jeopardy clause. New York's Appellate Division erred when it used the mere introduction of evidence (4 pages) to define the subject of prosecution, contrary to *U.S. v. Felix*.

### c. This Court's Decision in *Zauderer* Does Not Save the Procedure Below

Finally, this Court's decision in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 654–55 (1985), does not avail respondents. *Zauderer* involved the post-trial change of a legal theory, not post-trial change of the factual basis of the charge.

In *Zauderer* the prosecution changed the legal theory on how an attorney's advertisement was deceptive, after the trial was over. The attorney's advertisement offered to defend drunk-driving cases under a contingent fee. During the trial the prosecution contended that the advertisement was deceptive because contingent fees were illegal in criminal cases, *id.*, at

631, and after trial changed the theory of deception to the accused's failure to disclose the likelihood of a plea bargain. *Id.*, at 634. There was no change in the underlying factual basis of the charge, nor any indication that different evidence might be adduced in response. Moreover, in *Zauderer* the new legal theory was indisputably correct as a matter of judicial notice. *Id.*, at 655n.17.

None of these mitigating factors is present here. Here, unlike *Zauderer*, the State changed the factual basis of the charge itself after trial. Here the State did not change a legal theory, but changed the alleged facts which constituted petitioner's alleged violation. Here, before and during trial, petitioner was accused of improperly testing for oral mercury and of removing mercury fillings for safety reasons, for which there allegedly was "no basis in scientific fact" (A.18). After trial, the factual basis of the charge was changed to petitioner's failure to call a medical doctor for patient J.H. in particular "given this patient's [fragile] medical history" (A.13,15). This was a change in the facts constituting the charge, not merely a change in legal theory as occurred in *Zauderer*.

Moreover, here, unlike *Zauderer*, different evidence could be adduced in response to the new charge. Here the new factual basis for the charge reasonably would prompt petitioner to garner new evidence—new expert testimony on the lack of need for a doctor because of the patient's medical history, the patient's medical records, and testimony from the patient herself—none of which was called for under the prior charges pertaining to the bona fides of testing for oral mercury or of removing mercury fillings for health reasons.

Finally, here, unlike *Zauderer*, the new charge was not appropriate for judicial notice. Whether or not this particular patient needed, or did not need, a medical doctor "given this patient's medical history," is *not* a subject for judicial notice. The evidence on this medical issue certainly would be in conflict. By contrast, in *Zauderer* the likelihood of a plea

bargain in drunk-driving cases is within the judicial knowledge and appropriate for judicial notice. That is not the case here.

For all these reasons, *Zauderer* is not controlling here. Petitioner suffered a denial of his right to fair notice of the charges against him, secured by the Due Process Clause of the Fourteenth Amendment, when the State changed the factual basis of the charge *after* trial, at the Regents Review Committee, without any prior indication from the formal statement of charges, from the prosecutor's opening, or from the mere introduction of 4 pages of testimony, that this new basis selected by the Regents Review Committee would be the basis of the charges against him. The revocation of petitioner's license to practice dentistry violates the Due Process to which petitioner is entitled.

**2. The Result in the New York Courts Below Is a Serious Departure from the Results in Similar Cases in Other States and in the Federal Courts of Appeals**

The result in the New York Courts below is at odds with numerous State and federal appellate courts which have considered the issue. There are numerous reported decisions in which complaints in disciplinary proceedings are amended in an untimely fashion, leaving the accused with little or no time to respond to a new charge. The overwhelming body of case law has applied *Ruffalo* to reach a result contrary to the doctrine in New York. *Disciplinary Proceedings of Phelps*, 637 F.2d 171, 173–74 (10th Cir. 1981) (in attorney disciplinary proceeding, addition of new charge "not listed in the . . . complaint nor considered by the state hearing panel" violates Due Process); *In re Disciplinary Action Against Graham*, 453 N.W.2d 313, 316n.1 (Minn. 1990) ("As a matter of due process, [the accused] cannot be found to have violated disciplinary rules by certain actions which were not the subject of formal charges", citing *Ruffalo*); *Comm. on Professional Ethics v. Wenger*, 454 N.W.2d 367, 369 (Iowa 1990) (amending

disciplinary complaint at close of evidence deprives accused attorney of Due Process); *Burdge v. State Board of Medical Examiners*, 403 S.E.2d 114, 117 (S.C. 1991) (discipline of doctor for falsifying medical records where complaint charged only incompetent care and breach of protocol "constitutes a denial of procedural due process"); *Louisiana State Bar Association v. McGovern*, 481 So.2d 574, 577 (La. 1986) (addition of new violations after accused has testified is denial of Due Process under *Ruffalo*); *Matter of Myers*, 164 Ariz. 558, 795 P.2d 201, 204–05 (1990) (attempt to add new charge after trial is denial of Due Process, citing *Ruffalo*); *see also Yellow Freight System v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992) (last-minute change in accusations concerning employee discharge violates employer's right to Due Process).

This wealth of case law, which contrasts with the result reached in New York, warrants the exercise of this Court's certiorari jurisdiction to ensure uniformity and continued adherence to the principles articulated in *Ruffalo*.

### 3. The Divergence Among the States and Federal Circuits in Treating the Fair-Notice Issue Warrants the Guidance and Uniformity of a Supreme Court Decision

In the almost 25 years since *Ruffalo*, the State and federal appellate courts have treated the issue of fair notice in increasingly disparate, and often irreconcilable, fashion. As time passes, the Courts follow more divergent paths, using different factors to guide their decisions, with remarkably different and unpredictable results, in what should be a uniform body of law protecting the fundamental right of fair notice.

The divergence among the States takes many forms. For example, many cases differ on whether a post-trial amendment should be permitted without notice if the new post-trial charge is closely related to the original charge. These divergent lines of cases both cite *Ruffalo* to support their holdings: For cases allowing "closely related" amendments without prior notice,

*see In re Elias*, 114 Ill.2d 321, 499 N.E.2d 1327, 1332–33 (1986) (attorney discipline upheld based on new instances of commingling funds which are "illustrative of respondent's pattern and practice"); *Matter of Loyd*, 424 Mich. 514, 384 N.W.2d 9, 11–12 (1986) (permitting post-trial amendment to add subornation of perjury charge which was "integrally related" to misappropriation charge).[6] By contrast, other cases disallow post-trial amendments closely related to the original charge, unless with prior notice. *Matter of Myers*, 164 Ariz. 558, 795 P.2d 201, 204–05 (1990) (attorney who is charged with failure to fulfill obligations to *client* by failing to appear in Court may not be disciplined for failing to fulfill obligations to *Court* for same non-appearance); *Burdge v. State Board of Medical Examiners*, 403 S.E.2d 114, 117 (S.C. 1991) (discipline of doctor for falsifying medical records reversed where complaint charged only incompetent care and breach of protocol).

Other cases differ on whether the factual basis of the charge need only be set forth generally or must contain specific factual recitals. For cases allowing more general factual recitals, *see In re Elias*, 114 Ill.2d 321, 499 N.E.2d 1327, 1332–33 (1986) (complaint need not allege each instance of attorney's commingling funds); *Olmstead v. Dept. of Health*, 61 Wash. App. 888, 812 P.2d 527, 530 (Wash.App. 1991) (complaint need not allege accused's failure to attend group therapy sessions was the precise manner in which he failed to comply with monitored treatment program); *Matter of Matney*, 241 Kan. 783, 740 P.2d 598, 603 (1987) ("it is not necessary for

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[6]These pattern-and-practice cases cannot support the revocation here, because the present petitioner was accused only regarding a *single* patient (A.20–24). Nor can petitioner's failure to call a doctor *for this single patient* because of her peculiar medical history be deemed "integrally related" to the original charges that petitioner's general practice of mercury testing/removing mercury fillings was improper. However, these pattern-and-practice cases do underscore the divergence of applications under *Ruffalo* and the need for authoritative guidance following the 25 years since *Ruffalo* was decided.

the board to notify the respondent of specific acts of misconduct as long as the complaint sets out the basic factual situation from which the charges might result").

For cases holding the opposite—that the precise factual basis must be communicated to the accused—*see*: *Grievance Committee v. Goldfarb*, 9 Conn.App. 464, 519 A.2d 624, 630 (Conn.App. 1987) ("broad allegations would not provide the defendant with adequate notice of the specific charges which he was entitled to under the due process clause", citing *Ruffalo*); *In re Disciplinary Action Against Graham*, 453 N.W.2d 313, 316n.1 (Minn. 1990) (charge against attorney of making baseless criticisms of judge does not permit conviction on basis of letter never specified in charges); *Burdge v. State Board of Medical Examiners*, 403 S.E.2d 114, 117 (S.C. 1991) (discipline of doctor for falsifying medical records of patient is denial of Due Process where complaint alleged only other violations concerning that patient). *See also Bowman Transp., supra*, 419 U.S. at 288n.4 (1974) (Due Process requires that an accused "be *apprised of the factual material* on which the agency relies . . . so that he may rebut it"; emp. added).

Other cases diverge on whether a change in legal theory is permissible. Many cases hold that a post-trial change in legal theory deprives an accused of Due Process. *Disciplinary Proceedings of Phelps*, 637 F.2d 171, 173–74 (10th Cir. 1981) (addition of new legal theory against attorney after trial is violation of Due Process); *Attorney Grievance Comm. of Maryland v. Wright*, 306 Md. 93, 507 A.2d 618, 624 (1986) (complaint against attorney for failure to deliver funds must be dismissed because "charges . . . did not embody this theory", citing *Ruffalo*); cf. *People v. Garnett*, 725 P.2d 1149, 1151n.1 (Colo. 1986) (Due Process not violated because accused was given adequate notice of change in legal theory). On the other hand, this Court's decision in *Zauderer* appears to allow, in certain circumstances, a post-trial change in legal theory, but *Zauderer* did not delineate the bounds of permissible post-trial amendment (*see* discussion of *Zauderer* at pp. 25–26, *infra*).

Another division among the cases lies in whether any amendment at all is permitted once the trial has begun. The cases, citing *Ruffalo*, go both ways. Some cases appear inflexibly to prohibit amendment of the charges once trial has begun. *Comm. on Professional Ethics v. Wenger*, 454 N.W.2d 367, 369 (Iowa 1990) ("Because lawyer disciplinary actions are quasi-criminal in nature . . . 'the charge must be known before the proceedings commence' ", citing *Ruffalo*); *Louisiana State Bar Association v. McGovern*, 481 So.2d 574, 577 (La. 1986) ("the defendant must know the charge before the proceedings commence", citing *Ruffalo*). Other cases, also citing *Ruffalo*, allow amendments after commencement of the trial if the accused has a reasonable opportunity to respond to the new charge. *In re Riley*, 142 Ariz. 604, 609, 691 P.2d 695, 700 (1984) (amendment of charges permitted provided that accused has reasonable opportunity to respond); *Grievance Committee v. Goldfarb*, 9 Conn.App. 464, 519 A.2d 624, 630 (Conn.App. 1987) (amendment permitted because accused was offered a continuance to meet new charges); cf. *NLRB v. National Medical Hospital*, 907 F.2d 905, 910 (9th Cir. 1990) (Due Process not violated where record re-opened to permit employer to defend against new charge of unfair labor practice).

Other Courts appear to differ over whether *Ruffalo* even applies to certain forms of State discipline: *Compare Matter of Loyd*, 424 Mich. 514, 384 N.W.2d 9, 12 (1986) ("We have declined to apply *Ruffalo* in at least one judicial tenure case"), *with Goldman v. Nevada Comm. on Judicial Discipline*, 830 P.2d 107, 141 (Nev. 1992) (applying *Ruffalo* to discipline of judges); *In re Deming*, 108 Wash.2d 82, 736 P.2d 639, 650 (1987) ("A judge is entitled to the same procedural due process protection when facing disqualification as a lawyer facing disbarment").

These divergent paths taken by the States, in the 25 years since *Ruffalo*, warrant a cohesive re-statement of its fundamental principles, to give renewed authoritative guidance to the jurisprudence of fair notice in disciplinary proceedings.

### 4. This Court's Opinion in *Zauderer* Underscores the Need for Explication by this Court

This Court's decision in *Zauderer, supra*, also highlights the need for review now. *Zauderer* appears to be the only decision in this Court (1985) applying the Due Process requirement of notice in administrative disciplinary proceedings, in the 25 years since this Court's seminal decision in *Ruffalo* (1968). *Zauderer* suggested that there may be circumstances where a State may amend contentions after trial, but did not clearly delineate those circumstances. In *Zauderer* this Court permitted Ohio to reprimand an attorney for a deceptive advertisement, involving criminal defense of drunk-driving cases on a contingent fee, where the State changed its legal theory after trial on how the advertisement was deceptive. Initially, the State argued that the advertisement was deceptive because contingent fees were illegal in criminal cases, 471 U.S. at 631, but after trial changed the theory of deception to its failure to disclose the likelihood of a plea bargain. *Id.*, at 634. *Zauderer* suggests, but did not expressly indicate, that the post-trial change was permissible because it did not affect the factual basis of the charge, but only the legal theory of deception. By contrast, in *Ruffalo* the State changed the factual basis of the charge itself after trial, preventing the accused from meeting the charge against him.[7]

This distinction highlights the need for authoritative guidance now. Although the distinction between post-trial change in factual basis vs. post-trial change in legal theory appears to be the distinction between *Ruffalo* and *Zauderer*, this Court's

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[7]The present case more nearly resembles *Ruffalo* than *Zauderer*. Here, after the trial was over, the State changed the factual basis of the charge, *from* the alleged lack of scientific bases for testing for oral mercury or removing mercury fillings for health reasons (pre-trial charges, at A.20–24) *to* the alleged need for a doctor for a particular patient "given this patient's [particular] medical history" (post-trial Regents Review Committee, at A.13–15). *Ruffalo*, not *Zauderer*, controls here. *See* pp. 7–11, 14–20, *supra*.

decision in *Zauderer* was less than explicit. Although *Zauderer* indicated that the post-trial change in that case did not deprive the accused of "notice of the charges he had to answer", 471 U.S. at 654, *Zauderer* was less than explicit in explaining why. *Zauderer* pointed to the capacity of the Court to take judicial notice of the new post-trial legal theory, *id.*, at 655n.17, but did not explain that the State had changed only its legal theory, not the underlying factual basis of the charge. This is a critical distinction which warrants emphasis in its own right, given the central importance of the right to fair notice.[8]

In addition, the distinction is not always easy to apply. The difference *between* a change in factual basis *vs.* a change in legal theory can embroil courts in semantic disputes which elevate form over substance. Many of the cases which addressed changes in "theories" used the term broadly, often indistinguishably from changes in "factual bases" (p. 23, *supra*). This difference is not easy to apply. Nor have the cases treated the issue with consistency. Nor is it clear how, if at all, *Zauderer* would change these decisions. Authoritative guidance from this Court is appropriate.

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[8]*Zauderer* addressed the issue of notice at the end of a lengthy opinion which concentrated on other issues including attorney advertising and the First Amendment. The notice discussion in *Zauderer* entailed less than 2 pages (471 U.S. at 654–55) within a 30-page opinion (471 U.S. at 626–56).

## CONCLUSION

This Court should grant the petition for a writ of certiorari.

The principle which emerges from this Court's decisions and from the prevailing body of case law among the State and federal appellate courts is that prosecuting authorities in disciplinary proceedings may not add new charges, nor new factual bases for existing charges, after the trial is over and the accused no longer has an opportunity to meet the new charges or bases. *Ruffalo* and its prevailing progeny so hold. The result below in the New York Courts was a serious departure from this venerable constitutional principle.

At the same time, in the 25 years since *Ruffalo*, the States have taken divergent paths on how *Ruffalo* is to be applied. Nor have the States remained consistent in the standards which govern the permissibility of post-trial amendments.

This Court should give renewed authoritative guidance to the jurisprudence of fair notice in disciplinary proceedings.

Dated: New York, N.Y.
December 21, 1992

Respectfully submitted,

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EILEEN KING

*Of Counsel*

# APPENDIX

**[Order of New York Court of Appeals Dismissing Appeal]**

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the seventh day of April A.D. 1992

Present,

HON. SOL WACHTLER, *Chief Judge, presiding.*

Mo. No. 379 SSD 32

In the Matter of JOEL M. BERGER,

*Appellant,*

v.

BOARD OF REGENTS OF THE STATE OF NEW YORK, et al.,

*Respondents.*

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court *sua sponte*, upon the ground that no substantial constitutional question is directly involved. Judge Simons took no part.

/s/ DONALD M. SHERAW
Donald M. Sheraw
Clerk of the Court

**[Notice of Entry of Order of New York Court of Appeals Dismissing Appeal (order at A.1)]**

STATE OF NEW YORK
COURT OF APPEALS

Motion No. 379 (SSD 32)

◆

In the Matter of JOEL M. BERGER,

*Appellant,*

v.

BOARD OF REGENTS OF THE STATE OF NEW YORK, et al.,

*Respondents.*

◆

## NOTICE OF ENTRY

PLEASE TAKE NOTICE, that the within is a true and complete copy of an Order duly filed and entered in the Office of the Clerk of the Court of Appeals of the State of New York, on April 9, 1992 [sic—April 7, 1992].

Dated: New York, N.Y.
May 6, 1992

Yours, etc.

ROBERT ABRAMS
Attorney General of the State of New York
*Attorney for the Respondent*
120 Broadway
New York, New York 10271
(212) 416-8080

TO: DENNIS GROSSMAN, ESQ.
Grossman & King
475 Fifth Avenue, Suite 1800
New York, NY 10017
[Served by mail May 6, 1992]

**[Order of New York Court of Appeals Denying Reconsideration of Dismissal of Appeal and Denying Discretionary Leave to Appeal]**

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-second day of September A.D. 1992

Present,

HON. SOL WACHTLER, *Chief Judge, presiding.*

3-14 Mo. No. 781

In the Matter of JOEL M. BERGER,

*Appellant,*

v.

BOARD OF REGENTS OF THE STATE OF NEW YORK, et al.,

*Respondents.*

A motion having heretofore been made herein upon the part of the appellant for reconsideration of this Court's April 7, 1992 order of dismissal and for leave to appeal to the Court of Appeals in the above cause, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion for reconsideration of April 7, 1992 order of dismissal be and the same hereby is denied; and it is

ORDERED, that the said motion for leave to appeal be and the same hereby is denied.

/s/ DONALD M. SHERAW
Donald M. Sheraw
Clerk of the Court

**[Opinion and Judgment of New York Supreme Court, Appellate Division]**

SUPREME COURT — APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

Decided and Entered: December 12, 1991 (61698)

In the Matter of JOEL M. BERGER,

*Petitioner,*

v.

BOARD OF REGENTS OF THE STATE OF NEW YORK, et al.,

*Respondents.*

Calendar Date: October 17, 1991

Before:

WEISS, J.P., MIKOLL, YESAWICH JR., CREW III and HARVEY,

*Judges.*

GROSSMAN & KING (DENNIS GROSSMAN of counsel), New York City, for petitioner.

ROBERT ABRAMS, Attorney-General (KATHRYN M. SMITH of counsel), New York City, for respondents.

MEMORANDUM AND JUDGMENT

MIKOLL, J.

Proceeding pursuant to CPLR article 78 (initiated in this court pursuant to Education Law § 6510[5]) to review a determination of respondent Commissioner of Education which revoked petitioner's license to practice dentistry in New York.

Petitioner, a practicing dentist, was charged by the Office of Professional Discipline (hereinafter OPD) in December 1986 with nine specifications of misconduct: (1) practicing the profession fraudulently, (2) practicing beyond the authorized scope of dentistry, (3) practicing with gross negligence, (4) gross incompetence, (5) negligence on more than one occasion, (6) incompetence on more than one occasion, (7) excessive tests, unwarranted treatment, (8) undue influence and exploitation, and (9) practicing beyond the scope of the profession. The charges were based on petitioner's treatment of patient A over a period of several months and arose from the removal of patient A's amalgam fillings.

Hearings were held before a Hearing Panel on six days between July 24, 1987 and June 3, 1988 at which OPD presented two witnesses; Lewis Antine, an OPD investigator, and Robert Baratz, a dentist, physician and doctor of philosophy. Petitioner testified on his own behalf and offered the testimony of his expert witness, Murray Vimy. The testimony of the expert witnesses was at times conflicting on the issue of the propriety of petitioner's treatment. Patient A did not testify. However, Antine testified concerning his interview of patient A and stated that patient A told him that she had been suffering from various ailments for years. She first heard about petitioner on television. Patient A visited petitioner, who, after listening to her complaints, used a "Jerome Mercury Vapor Analyzer" to test for mercury vapor in her mouth. Petitioner also performed a saliva acidity test and measured the electrical current in patient A's mouth. Petitioner apparently told patient A that mercury in small amounts could be toxic. Over a period of time petitioner removed all her amalgam fillings and replaced them with nonmercury based fillings.

Shortly after the filling work was completed, patient A developed a burning sensation in her mouth. Petitioner then reportedly advised her to drink a detoxifying agent to cleanse her

system of the remaining mercury. The sensation continued and patient A went to see an allergist and eventually had all the fillings that had been replaced by petitioner removed and refilled by another dentist.

Following the hearings, the Hearing Panel issued a report recommending that petitioner be found guilty of all the charges and that his license to practice be revoked. After reviewing the record, the Regents Review Committee heard oral arguments on behalf of petitioner and OPD and then recommended that the findings and conclusions of the Hearing Panel be accepted. The Regents Review Committee also recommended as a penalty that petitioner's license be suspended for two years on each specification, with the suspensions to run concurrently.

Respondent Board of Regents accepted the findings and conclusions as recommended by the Hearing Panel and the Regents Review Committee, but increased the penalty to a revocation of petitioner's license to practice dentistry as to each guilty specification. Respondent Commissioner of Education issued an order reflecting the Board of Regent's determination and this proceeding followed.

The primary issue to be resolved is whether the determination of petitioner's guilt of each specification by a preponderance of the evidence is supported by substantial evidence in the record (*see, Matter of Edelman* v *Sobol*, ___ AD2d ___ [June 20, 1991], slip opn p 2, *appeal dismissed* 78 NY2d 1006; *Matter of Carrera* v *Sobol*, 163 AD2d 706, 708, *affd* 77 NY2d 931). In our view specification Nos. (1), (2), (3), (4), (5), (6), (7) and (9) are supported by substantial evidence while specification No. (8) is not.

Initially, we note that the issue does not, as petitioner contends, turn on whether petitioner's views on the toxicity of amalgam fillings are correct. Rather, the issue is whether petitioner's treatment of patient A's medical problems by removing her amalgam fillings without further investigation and medical evidence that the procedure was warranted constituted the acts of misconduct of which petitioner was found guilty. We note that petitioner's claim that respondents improperly relied on a new medical intervention, i.e., petitioner should have gained prior medical

clearance for removal of patient A's dental fillings by reason of her medical condition, to sustain the charges, because petitioner was not tried on the medical intervention charge nor given notice of it, is without foundation. The failure to obtain prior medical approval before removal of the amalgam fillings was not a new charge of misconduct. It was merely the factual basis behind the charges including that of practicing beyond the profession discussed during the hearing. Each of the expert witnesses addressed the need for the participation of a physician in the diagnosis and treatment of mercury-related problems. Contrary to petitioner's assertions, he had adequate notice of the medical intervention issue during the hearing.

Next, we find that there was substantial evidence to support specification No. (1), the fraudulent practice of dentistry. Petitioner correctly argues that proof of "the intentional misrepresentation or concealment of a known fact" is required to sustain this charge (*Matter of Brestin* v *Commissioner of Educ. of State of N.Y.*, 116 AD2d 357, 359; *see, Matter of Choudhry* v *Sobol*, 170 AD2d 893, 894). However, that intent or knowledge may be inferred from the surrounding circumstances (*see, Matter of Sung Ho Kim* v *Board of Regents of Univ. of State of N.Y.*, ___ AD2d ___ [Apr. 4, 1991], slip opn p 2, *lv denied* 78 NY2d 856; *Matter of Klein* v *Sobol*, 167 AD2d 625, 628, *lv denied* 77 NY2d 809). Facts from which such intent can be inferred were proven. Petitioner based his treatment on a test which the expert witness for OPD testified provided meaningless results, advised patient A of those results which he should have known were unreliable, represented to her that she "might" or "could" feel better after the removal of her fillings, and subjected patient A to a procedure which he was not qualified to determine was warranted without medical approval. Petitioner's rendering of the unwarranted treatment, which he knew or should have known was beyond the scope of the practice of dentistry under the circumstances, could properly be found to be the fraudulent practice of dentistry by the trier of fact.

There was also substantial evidence presented to sustain specification Nos. (2) and (9) alleging that petitioner practiced beyond the scope of the profession of dentistry in violation of Education Law § 6509(2) and 8 NYCRR 29.1(b)(9). Baratz, OPD's expert

witness, testified that diagnosing mercury toxicity and/or mercury sensitivity, as petitioner did, was beyond the scope of the practice of dentistry and that it was improper for petitioner to remove patient A's fillings after only conducting mercury vapor, saliva acidity and electrical current tests. Baratz also stated that in view of patient A's numerous physical complaints, it was necessary to first consult with her physician, explore her symptoms further and, if it then was found necessary to remove her amalgam fillings, to do the procedure in a hospital. Vimy, petitioner's expert, who had been under the impression that patient A had been under the care of a physician at the time petitioner treated her (when in fact she was under the care of a chiropractor), implied that it would be improper to remove amalgam fillings to treat a patient's medical problems.

Likewise, substantial evidence was presented to sustain specification Nos. (3) and (4) charging petitioner with practicing the profession with gross negligence and gross incompetence. In order to support a finding of gross negligence, the conduct must be "egregious" (*Matter of Spero* v *Board of Regents of Univ. of State of N.Y.*, 158 AD2d 763, 764). The fact finder could conclude that petitioner's removal and replacement of some 14 amalgam fillings was not only unwarranted treatment beyond the scope of the practice of dentistry, of which petitioner was or should have been aware, but was also egregious and conspicuously bad conduct, undertaken for the purpose of self-enrichment.

In view of the above, it is clear specification Nos. (5) and (6), charging petitioner with practicing the profession with negligence and incompetence on more than one occasion, respectively, are also sustained. The fillings were removed and replaced during separate appointments on separate days over a period of time. Petitioner additionally directed patient A to drink a detoxifying agent to cleanse her system of mercury after she complained of a burning sensation in her mouth sometime after her amalgam fillings had been removed and replaced. These could be found to be distinct acts of negligence (*see, Matter of Orozco* v *Sobol*, 162 AD2d 834, 836).

Based on the previously stated testimony of Baratz, the findings of guilt as to specification No. (7) (excessive tests/unwar-

ranted treatment) is also supported by substantial evidence. Specification No. (8), however, charging undue influence, was not supported by substantial evidence to sustain the finding of guilt. The evidence presented relating to this charge did not rise to the level of undue influence. Annulment of specification No. (8) is therefore required. However, the penalty imposed should not be changed as petitioner's license to practice was revoked as to each specification upon which he was found guilty. We also deem the penalty appropriate under the circumstances.

WEISS, J.P., YESAWICH JR., CREW III and HARVEY, JJ., concur.

ADJUDGED that the determination is modified, without costs, by annulling the finding of guilt as to specification No. 8, and, as so modified, confirmed.

ENTER:

/s/ MICHAEL J. NOVACK

Michael J. Novack
Clerk

**[Final Order of New York Board of Regents Revoking Dental License]**

THE UNIVERSITY OF THE STATE OF NEW YORK

In the Matter of JOEL M. BERGER (Dentist)

DUPLICATE ORIGINAL VOTE AND ORDER
No. 6956

Upon the report of the Regents Review Committee, a copy of which is made a part hereof, the record herein, under Calendar No. 6956, and in accordance with the provisions of Title VIII of the Education Law, it was

*VOTED* (March 23, 1990): That the record herein be accepted; that the findings of fact of the Hearing Panel of the State Board for Dentistry in the matter of JOEL M. BERGER, respondent, be accepted; that the determination of the Hearing Panel as to the question of guilt of the respondent be accepted; that the recommendation of the Hearing Panel as to the penalty to be imposed upon respondent be accepted; that the recommendation of the Regents Review Committee be accepted as to the findings and determination of the hearing panel and the recommendation of the Regents Review Committee be modified as to the measure of discipline and that, based upon the serious nature of the misconduct committed and in agreement with the recommendation of the hearing panel, respondent's license to practice as a dentist in the State of New York be revoked upon each specification of the charges of which the Regents Review Committee recommends respondent be found guilty; that respondent is guilty, by a preponderance of the evidence, of the first, second, third, fourth, fifth, sixth, seventh, eighth and ninth specifications; that respondent may apply for restoration after one year, pursuant to Rule 24.7(b) of the Rules of the Board of Regents, but said application shall not be automatically granted; and that the Commissioner of Education be empowered to execute, for and on behalf of the

Board of Regents, all orders necessary to carry out the terms of this vote;

and it is

*ORDERED:* That, pursuant to the above vote of the Board of Regents, said vote and the provisions thereof are hereby adopted and SO ORDERED, and it is further

ORDERED that this order shall take effect as of the date of the personal service of this order upon the respondent or five days after mailing by certified mail.

IN WITNESS WHEREOF, I, THOMAS SOBOL, Commissioner of Education of the State of New York, for and on behalf of the State Education Department and the Board of Regents, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 18th day of April, 1990.

[SEAL]

/s/ THOMAS SOBOL
Commissioner of Education

**[Report and Recommendation of Regents Review Committee (intermediate-level administrative review)]**

THE UNIVERSITY OF THE STATE OF NEW YORK

No. 6956

In the Matter of the Disciplinary Proceeding against JOEL M. BERGER, who is currently licensed to practice as a dentist in the State of New York.

## REPORT OF THE REGENTS REVIEW COMMITTEE

On July 24, 1987, October 9, 1987, February 11, 1988, March 24, 1988, March 25, 1988, and June 3, 1988, a hearing was held in the instant matter before a hearing panel of the State Board for Dentistry.

The hearing panel rendered a report of its findings, determination and recommendation, a copy of which is annexed hereto, made a part hereof, and marked as Exhibit "A".

The hearing panel returned unanimously that respondent was guilty of the first, second, third, fourth, fifth, sixth, seventh and ninth specifications and, by a vote of four to one, determined that respondent was guilty of the eighth specification. The hearing panel unanimously recommended that respondent's license to practice as a dentist in the State of New York be revoked upon the specifications of the charges of which respondent was found guilty.

On January 25, 1990 respondent did appear before us in person and was represented by his attorney, Robert S. Asher, Esq., who presented oral argument on behalf of respondent. Sherrie B. Thompson, Esq., presented oral argument on behalf of petitioner.

Petitioner's recommendation as to the penalty to be imposed, should respondent be found guilty, was revocation.

Respondent indicated that respondent is not guilty.

We have reviewed the record, including respondent's Memorandum of Law and Reply Memorandum of Law, both undated, respondent's Affirmation dated December 12, 1989, as well as petitioner's Reply Memorandum of Law dated January 22, 1990.

It is our unanimous opinion that, based upon our review of the record, respondent has not demonstrated bias on behalf of the hearing panel, which includes a public member who is not a dentist, based upon an allegation that the dentist hearing panel members may have used mercury in the fillings of their patients and may have had an interest in protecting such practice, or because the hearing panel chose to accept the expert testimony of petitioner over that of respondent. Nor has bias been demonstrated, in our unanimous opinion, because the hearing panel may have read an article published in *Consumer Report's* magazine, which article was not admitted into evidence at the hearing and which adversely depicted respondent's dental practice. In that regard, respondent and his counsel were aware of the existence of the article at the time of the hearing and such article, including the hearing panel's familiarity therewith, was taken into consideration by respondent's counsel, an experienced attorney, who chose not to voir dire the hearing panel at that time, or to otherwise object during the course of the hearing. Furthermore, respondent's counsel specifically mentioned the article and assumed that the hearing panel would disregard such information (transcript page 461).

We now turn to the merits of this matter. On April 12, 1984 respondent, a dentist, reviewed the patient's medical history and was concerned, based upon the patient's medical history, the symptoms the patient described on it, which included pain throughout her body, and the pain she discussed with respondent, that mercury could be one of the factors in her illness (transcript pages 660–661). One of the things that guided him was a medical article relating to mercury in regard to psychotic and neurological disorders of undetermined etiology (transcript page 662). Thereafter, on the same day, respondent proceeded to test the patient for mercury toxicity and, based upon such testing, informed respondent [sic, patient] that mercury was toxic in amounts smaller than those measured and that when she chewed food she was poisoning herself because the mercury in her fillings was

toxic and released in small doses. Respondent recommended the replacement of the fillings containing mercury and informed the patient of future improvement in terms of her arm and leg pains.

In April and May 1984 the fillings were replaced. Subsequent thereto, the patient experienced problems in her throat and mouth, informed respondent thereof, and he recommended a detoxifier for mercury.

It is our unanimous opinion, based upon our review of the record, that respondent was treating a medical problem and that, given this patient's medical history, medical intervention should have been obtained in this matter prior to any dental procedure being performed on the patient (see transcript pages 63–64). In this regard, we do not pass upon the medical issue of whether, in general, fillings containing mercury are harmful to the human body and should be removed.

In view of the foregoing, we unanimously recommend that the findings and determination of the hearing panel be accepted.

With respect to the measure of discipline to be imposed, we unanimously recommend that the recommendation of the hearing panel be modified, that respondent's license to practice as a dentist in the State of New York be suspended for two years upon each specification of the charges of which respondent was found guilty, as aforesaid, and that said suspensions run concurrently. In arriving at our recommended measure of discipline, we have considered respondent's licensure since August 2, 1960 and the misconduct having occurred, at different times, in 1984 with regard to one patient, and feel that our recommended measure of discipline is sufficient and appropriate under the circumstances.

Respectfully submitted,

J. EDWARD MEYER
MELINDA AIKINS BASS
THEODORE M. BLACK

/s/ J. EDWARD MEYER
Chairperson

Dated: March 9, 1990

**[Report of Hearing Panel (administrative trial level)]**

THE UNIVERSITY OF THE STATE OF NEW YORK

In the Matter of the Disciplinary Proceeding against JOEL M. BERGER, who is currently licensed to practice as a dentist in the State of New York.

## REPORT OF FINDINGS, DETERMINATION AND RECOMMENDATION

CAL. NO. 6956

*Report of the Hearing Panel*

JOEL M. BERGER, hereinafter referred to as respondent, was licensed to practice as a dentist in the State of New York by the New York State Education Department.

The instant disciplinary proceeding was commenced by service of the notice of hearing and statement of charges upon respondent.

The respondent was charged with practicing fraudulently (first specification), with practicing the profession beyond its authorized scope (second specification), with gross negligence (third specification), with gross incompetence (fourth specification), with negligence on more than one occasion (fifth specification), with incompetence on more than one occasion (sixth specification), and with unprofessional conduct (seventh, eighth and ninth specifications). A copy of the charges is annexed hereto, made a part hereof, and marked as Exhibit "A".

On July 24, 1987, October 9, 1987, February 11, 1988, March 24, 1988, March 25, 1988 and June 3, 1988 a hearing was held before a hearing panel of the State Board of Dentistry.

Petitioner was represented by Sherrie Thompson, Esq.

Respondent did appear and was represented by an attorney, Robert S. Asher, Esq.

The Administrative Officer in this matter was Kenneth D. Hagood.

We have carefully reviewed and considered the entire record and render the following findings of fact, determination as to guilt, and recommendation as to the penalty to be imposed.

## FINDINGS OF FACT

1. Respondent was authorized to practice as a dentist in the State of New York by the New York State Education Department.

2. The respondent is currently registered to practice dentistry in the State of New York from an address at 56-03 214th Street, Bayside, New York 11364.

3. Between April, 1984 and July, 1984 respondent treated a patient who was suffering from arm and leg pain.

4. Respondent performed tests for mercury vapor and electric current in said patient's mouth.

5. Respondent told said patient that mercury was toxic in amounts smaller than those measured and that when she chewed food she was poisoning herself because the mercury in the amalgam fillings in her mouth was toxic and was released in small doses.

6. Respondent recommended the replacement of all of said patient's existing amalgam fillings and told her that in one month her arm and leg pain would be improved slightly and that in six months it would be much better.

7. Respondent subsequently removed and replaced ten fillings in said patient's mouth.

8. Subsequent to the removal and replacement of the aforesaid fillings, the patient developed a chronic sore throat and a burning sensation in her mouth.

9. When the patient complained of this to respondent, respondent told her, in substance, that mercury was trapped in the

tissues of her mouth and that she had to take a detoxifying agent to get rid of it.

## DETERMINATION AS TO GUILT

We unanimously determine that the charges contained in the first, second, third, fourth, fifth, sixth, seventh and ninth specifications have been proven by a preponderance of the evidence and that respondent is guilty of the same.

We, by a vote of 4 to 1 of the panel members, determine that the charges contained in the eighth specification have been proven by a preponderance of the evidence and that respondent is guilty of the same.

## RECOMMENDATION AS TO PENALTY TO BE IMPOSED

In determining the measure of discipline to be imposed upon respondent, we have taken into consideration the entire record.

We take a very serious view of respondent's misconduct. The Hippocratic Oath instructs us to "first do no harm". We believe respondent, by innuendo and practice, led patients to believe that he would cure them of ills when indeed this was untrue. Patients were subjected to needless dental procedures with no practical hope of cure. This is a violation of the oath "to do no harm."

This panel regards as most heinous the practice of health professionals who prey upon those who suffer pain and discomfort, whether physical or psychogenic in origin. Offering or suggesting to these gullible unfortunates a possible treatment or remedy that has no basis in scientific fact does nothing but enhance the finances of the provider and is unforgivable.

The State's chief witness, Dr. Baratz, has impeccable training and credentials as opposed to the respondent's supporters. The evidence and testimony overwhelmingly proved that the respondent's testing was beyond the scope of practice and his treatment had no basis in scientific fact.

Accordingly, we hereby unanimously recommend to the Board of Regents that respondent's license to practice as a dentist in the

State of New York be revoked upon the specifications of the charges of which respondent has been found guilty.

Respectfully submitted,

DR. RICHARD A. VALENTE,
Chairperson
DR. RALPH P. BALDINI
MR. JOHN J. DEVER III
DR. ALLAN V. GIBBONS
DR. WILLIAM R. SMITHEA

/s/ RICHARD A. VALENTE
Chairperson

Dated: July 19, 1989

**[Formal Statement of Charges]**

NEW YORK STATE EDUCATION DEPARTMENT
OFFICE OF PROFESSIONAL DISCIPLINE
STATE BOARD FOR DENTISTRY

In the Matter of the Disciplinary Proceeding against JOEL M. BERGER, who is currently licensed to practice as a dentist in the State of New York.

STATEMENT OF CHARGES

CAL. NO. 6956

THE NEW YORK STATE EDUCATION DEPARTMENT BY ITS DIVISION OF PROSECUTION OF THE OFFICE OF PROFESSIONAL DISCIPLINE ALLEGES AS FOLLOWS:

*FIRST:* JOEL M. BERGER, hereinafter referred to as the Respondent, was issued license No. 022681 on August 2, 1960 by the New York State Education Department authorizing the Respondent to practice as a dentist in the State of New York.

*SECOND:* Respondent is currently registered to practice as a dentist in the State of New York from an address at: 56-03 214th Street, Bayside, New York 11364.

FIRST SPECIFICATION OF
PROFESSIONAL MISCONDUCT

*THIRD:* Respondent is charged with practicing the profession of dentistry fraudulently within the purview and meaning of Section 6509(2) of the Education Law of the State of New York, in that:

Between April, 1984 and July, 1984, Respondent treated a patient, [J.H.], who was suffering from arm and leg pain. Respondent performed tests for mercury vapor and electric current in the patient's mouth. Respondent told the patient that mercury was toxic in amounts smaller than those measured, and that when she chewed food she was poisoning herself because the mercury in the amalgam fillings in her mouth was toxic and was released in small doses. Respondent recommended the replacement of all of the patient's existing amalgam fillings, and told her that in one month her arm and leg pain would be improved slightly and that in six months it would be much better. Respondent subsequently removed and replaced ten fillings in said patient's mouth.

Subsequent to the removal and replacement of the aforesaid fillings, the patient developed a chronic sore throat and a burning sensation in her mouth. When the patient complained of this to Respondent, Respondent told her, in substance, that mercury was trapped in the tissues of her mouth and that she had to take a detoxifying agent to get rid of it.

SECOND SPECIFICATION OF
PROFESSIONAL MISCONDUCT

*FOURTH:* Respondent is charged herein with practicing the profession of dentistry beyond its authorized scope within the purview and meaning of Section 6509(2) of the New York State Education Law, in that:

> The allegations set forth in the First Specification, paragraph "THIRD" are repeated, reiterated and realleged with the same force and effect as if more particularly set forth at length herein.

THIRD SPECIFICATION OF
PROFESSIONAL MISCONDUCT

*FIFTH:* Respondent is charged herein with gross negligence within the purview and meaning of Section 6509(2) of the New York State Education Law, in that:

> The allegations set forth in the First Specification, paragraph "THIRD" are repeated, reiterated and realleged with

the same force and effect as if more particularly set forth at length herein.

FOURTH SPECIFICATION OF
PROFESSIONAL MISCONDUCT

*SIXTH:* Respondent is charged herein with gross incompetence within the purview and meaning of Section 6509(2) of the New York State Education Law, in that:

The allegations set forth in the First Specification, paragraph "THIRD" are repeated, reiterated and realleged with the same force and effect as if more particularly set forth at length herein.

FIFTH SPECIFICATION OF
PROFESSIONAL MISCONDUCT

*SEVENTH:* Respondent is charged herein with negligence on more than one occasion within the purview and meaning of Section 6509(2) of the New York State Education Law, in that:

The allegations set forth in the First Specification, paragraph "THIRD" are repeated, reiterated and realleged with the same force and effect as if more particularly set forth at length herein.

SIXTH SPECIFICATION OF
PROFESSIONAL MISCONDUCT

*EIGHTH:* Respondent is charged herein with incompetence on more than one occasion within the purview and meaning of Section 6509(2) of the New York State Education Law, in that:

The allegations set forth in the First Specification, paragraph "THIRD" are repeated, reiterated and realleged with the same force and effect as if more particularly set forth at length herein.

SEVENTH SPECIFICATION OF
PROFESSIONAL MISCONDUCT

*NINTH:* Respondent is charged herein with unprofessional conduct within the purview and meaning of Section 6509(9) of the New York State Education Law, and in specific violation of 8 NYCRR 29.2(a)(8) of the New York State Education Law, in that:

The allegations set forth in the First Specification, paragraph "THIRD" are repeated, reiterated and realleged with the same force and effect as if more particularly set forth at length herein.

EIGHTH SPECIFICATION OF
PROFESSIONAL MISCONDUCT

*TENTH:* Respondent is charged herein with unprofessional conduct within the purview and meaning of Section 6509(9) of the New York State Education Law, and in specific violation of 8 NYCRR 29.1(b)(2), in that:

The allegations set forth in the First Specification, paragraph "THIRD" are repeated, reiterated and realleged with the same force and effect as if more particularly set forth at length herein.

NINTH SPECIFICATION OF
PROFESSIONAL MISCONDUCT

*ELEVENTH:* Respondent is charged herein with unprofessional conduct within the purview and meaning of Section 6509(9) of the New York State Education Law, and in specific violation of 8 NYCRR 29.1(b)(9), in that:

The allegations set forth in the First Specification, paragraph "THIRD" are repeated, reiterated and realleged with the same force and effect as if more particularly set forth at length herein.

WHEREFORE, it is requested that a disciplinary penalty be exacted upon the Respondent and upon the license and registration previously granted to the Respondent to practice dentistry in

the State of New York.

Dated: 9th day of December, 1986

JOSEPH FISCH
PROFESSIONAL CONDUCT OFFICER

By: /s/ SHERRIE B. THOMPSON
SHERRIE B. THOMPSON
Prosecuting Attorney
Office of Professional
Discipline
N.Y.S. Education Department
622 Third Avenue – 37th Floor
New York, New York 10017
(212) 557-2196

**[Prosecutor's Opening Statement at Trial]**

NEW YORK STATE EDUCATION DEPARTMENT
OFFICE OF PROFESSIONAL DISCIPLINE
STATE BOARD FOR DENTISTRY

In the Matter of the Disciplinary Proceeding against JOEL M. BERGER, who is currently licensed to practice as a dentist in the State of New York.

MINUTES OF PROCEEDINGS
HELD JULY 24, 1987

* * *

[9]

* * *

THE CHAIRMAN: . . . . Ms. Thompson?

MS. THOMPSON: Good morning. My name is Sherrie Thompson. I am a prosecuting attorney with the Office of Professional Discipline. The matter before you today concerns the alleged unwarranted removal of amalgam fillings from the mouth of [10] Dr. Berger's patient [J.H.]. The department alleges that in April of 1984, [J.H.] went to Dr. Berger after seeing him on TV and hearing him on the radio advocating the removal of amalgam fillings due to alleged toxicity of the mercury contained in the fillings. Dr. Berger performed tests for mercury vapor and electric current in her mouth at which time he recommended the removal of her amalgam fillings. The fillings were subsequently removed over the course of several visits. Thereafter [J.H.] developed a chronic burning sensation in her mouth and throat.

The department has charged the respondent with practicing the

profession of dentistry fraudulently, practicing the profession of dentistry beyond its professional scope in violation of Education Law Section 6509.2 as well as 29.1(b)(0) [sic] of the Regents Rules with gross negligence, gross incompetence, negligence on more than one occasion, incompetence on more than one occasion, ordering of excessive treatment not warranted by the condition of the patient and exercising undue influence on the patient so as to exploit the patient for the financial gain of the respondent.

**[11]**

You will hear testimony from the department's expert witness Dr. Robert Baratz who will shed some light on the question of the appropriateness of removing amalgam fillings. At a future date you will also hear testimony from the complainant in this matter, [J.H.], regarding her treatment by Dr. Berger. At the conclusion of all the testimony the department will have proved the aforementioned charges by a preponderance of the evidence.

* * *

**[Excerpt of direct testimony of State's expert witness]**

NEW YORK STATE EDUCATION DEPARTMENT
OFFICE OF PROFESSIONAL DISCIPLINE
STATE BOARD FOR DENTISTRY

In the Matter of the Disciplinary Proceeding against JOEL M. BERGER, who is currently licensed to practice as a dentist in the State of New York.

MINUTES OF PROCEEDINGS
HELD JULY 24, 1987

* * *

[62]

* * *

[MS. THOMPSON:]

Q I'm going to ask you to assume some facts to be true. Assume that a patient presents herself to a dentist and she indicates on the medical history part of the initial visit form that she has or has had chest pain up exertion, shortness of breath after mild exercise, shortness of breath when lying down or requiring extra pillows when she sleeps, urinating more than six times a day, arthritis, tachycardia, red flushes of color, numbness in any part of the body, tingling in any part of the body, indigestion, depression, chronic fatigue, tires easily, sweats excessively, cold hands and feet, leg cramps, gets up-at night to urinate, urinates frequently during the day, arthritis rheumatoid, ostiod, and assume that she has no dental complaints and assume that a Jerome mercury analyzer test shows 159 micrograms per cubic meter for the right side of her mouth and 129 micrograms per cubic meter for the left side after five minutes of chewing gum,

and assume the patient's saliva measures at 6.0 and assume that the patient comes to the doctor and **[63]** says I would like you to test me for mercury toxicity.

Assume that the dentist says that mercury is toxic in amounts smaller than those measured; do you have an opinion with a reasonable degree of dental certainty whether it is proper to remove amalgam fillings from the patient's mouth due to mercury toxicity?

A I do.

Q What is your opinion?

A My opinion is that it would be grossly improper to do that on this patient for a variety of reasons. The first is that anyone presenting with this much of a medical history is obviously a very sick patient and probably one needs to investigate extensively what the nature of her medical problems are before attempting to do any dental procedure on this patient since it appears that she has some form of heart disease or lung disease based on her shortness of breath symptoms. She seems to have some chronic disease due to her joint complaints and she seems to have some sort of nervous disorder due to her blushing or tingling. Because of that I would call a physician to find out how safe it is to do a dental procedure on this patient to begin with, be it a tooth cleaning or an x-ray. The next thing I would do is that if this patient had asked me to remove fillings for any **[64]** reason, I would want to know why I am removing them and if I'm examining this patient and took x-rays and found no dental reason for the removal of these fillings regardless of whatever the mercury vapor measurements were which we can talk about later, I wouldn't find any evidence to remove these fillings. That's the way you presented the patient to me. I would need to know a lot more about this patient before attempting to do any dental procedure on this patient. Just from the sound of it, it sounds that if this patient were stable and this work needed to be done, that it would best be done in a hospital setting and certainly not in a regular office.

Q Upon what is your opinion based?

A The way I was taught to properly evaluate dental patients

in dental school and my years of experience as a practicing dentist in terms of establishing safe conditions under which to do dentistry in an office setting.

Q I'm going to ask you again to assume those exact same facts except that I want you to assume that the patient comes to the doctor and says I have been told that my amalgam fillings are toxic and I want to have them removed. Do you have an opinion with a reasonable degree of dental certainty as to whether it is proper to remove the amalgam fillings in the patient's mouth under those circumstances?

[65]

A I do.

Q What is your opinion?

A My opinion is that it would not be proper until I established to my own satisfaction that what the patient told me was correct and that I had something from their physician documenting this fact for the record since for me to do it otherwise would be negligent practice on my part.

Q Upon what is your opinion based?

A Reading of the dental practice act and proper managing of patients in dentistry as I was taught in dental school and have become accustomed to practicing over the years.

MS. THOMPSON: I have no further questions of this witness at this time.

**[Excerpt of testimony of petitioner's expert witness]**

NEW YORK STATE EDUCATION DEPARTMENT
OFFICE OF PROFESSIONAL DISCIPLINE
STATE BOARD FOR DENTISTRY

In the Matter of the Disciplinary Proceeding against JOEL M. BERGER, who is currently licensed to practice as a dentist in the State of New York.

MINUTES OF PROCEEDINGS

* * *

Q On Page 62, Dr. Baratz was asked to assume certain facts. It goes from Line 70 to Page 63, Line 2.

I would like you to assume the same facts.

A Okay.

Dr. Baratz is addressing a question of whether an individual with a certain set of symptoms and certain mercury vapor levels, whether it would be proper to remove the amalgam fillings.

Q Is that the same set of facts, in fact, that you found when you looked at the record of [J.H.]?

A Yes. Now, the question goes on to say, "Due to mercury toxicity," and I would say that, no, and I would agree with Dr. Baratz, that for mercury toxicity you would not remove the fillings, but you would remove the fillings because the levels were high and there's an environmental contamination.

So, he answered the way I would answer, but I don't think that's the intent of the question.

Q You would complete that by expanding your answer beyond mercury toxicity to deal with that?

A To deal with environmental, oral environmental exposure to mercury. With those symptoms and the levels she had, there's good evidence there she's being exposed to mercury and may or may not have a mercurialism. I am not concerned about the mercurialism, because I practice dentistry, not medicine, but I.am concerned because there's a dental material placed by dentists, and, in her particular situation, this individual—it appears to be a problem, because the levels are tremendously high. So, I would advise her that she might want to get rid of that chronic exposure. It's a totally different ball of wax than removing the fillings for toxicity.

* * *

**[Excerpt from petitioner's brief in New York Appellate Division quoting scientific evidence at trial]**

# New York Supreme Court

APPELLATE DIVISION—THIRD DEPARTMENT

JOEL M. BERGER,

*Petitioner,*

—v.—

BOARD OF REGENTS OF THE STATE OF NEW YORK, NEW YORK STATE DEPARTMENT OF EDUCATION, and THOMAS SOBOL as Commissioner of Education of the State of New York,

*Respondents.*

## BRIEF FOR PETITIONER

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## IV. THE FACTS

### A. The Controversy over the Safety of Mercury-Based Amalgam Fillings

Mercury is extremely toxic. There is no known minimal level of safe exposure (A.135b: "mercury is a toxin. There is no safe level of mercury"). It is so toxic that dentists are instructed not to touch mercury fillings by hand, to manipulate them only with metal instruments, and to keep their mercury inventories and waste tightly sealed to prevent their inhaling its deadly vapors. ADA, *Dentists' Desk Reference*, "Mercury" pp. 41-42 (2d ed. 1983).

#### 1. The Scientific Literature/Conferences Indicating the Dangers of Mercury-Based Amalgam Fillings

Mercury is used in dental fillings because of its durability and the long-held belief that it remained stable in fillings after they hardenned without danger to dental patients. That belief changed in 1979 with publication of a scientific study showing that chewing or brushing teeth disbursed mercury from amalgam fillings. As shown below, further studies indicate that mercury from amalgam fillings travels to the brain, blood, lungs and kidneys, and to unborn fetuses, causing stillbirths and malformed babies. Studies also indicate that mercury from amalgam fillings is a health hazard, the primary source of toxic mercury in the general population, and a violation of EPA standards for mercury exposure.

Numerous studies underscore the release of mercury from amalgam fillings, beginning with Dr. Gay's study in 1979:

> [T]he level of elemental mercury in the expired breath of patients with silver-mercury amalgams up to 2 years old increased almost four times after a 15 minute period of chewing. The patients with no silver-mercury fillings had lower levels of mercury before chewing than did patients with fillings, and their mercury levels were not affected by chewing.

(A.268; Drs. Gay et al., "Chewing Releases Mercury from Fillings", *Lancet*, May 5, 1979, p.985).

Later dental studies confirmed the release of mercury from dental amalgams, but at much higher mercury levels:

> The subjects with amalgams experienced an average 15.6-fold increase in the level of mercury in expired air after chewing. . . . Subjects without amalgams showed a decrease after chewing. In addition, subjects with dental amalgams had a significantly higher level of mercury in their expired air before chewing when compared with subjects without dental amalgams. . . .
>
> [T]he increase in mercury vapor concentrations is related to numbers of amalgam restorations.

(A.270,271-72; Drs. Svare et al., "The Effect of Dental Amalgams on Mercury Levels in Expired Air", *Journal of Dental Research*, Sept. 1981, p. 1668, at 1669-70). A later study found a 54-fold increase over control subjects after chewing by patients with amalgam fillings:

> [There is a] direct correlation between the stimulated Hg [mercury] vapor concentration in intra-oral air and the numbers and types of amalgam restorations. . . .
>
> [I]n subjects with dental amalgams, the concentration of Hg [mercury] vapor in intra-oral air after chewing stimulation is 54-fold the basal levels in control subjects who have no dental amalgams.

(A.278,280; Drs. Vimy & Lorscheider, "Intra-Oral Air Mercury Released from Dental Amalgam", *Journal of Dental Research*, Aug. 1985, p. 1069, at 1071).

Dental research has linked amalgam fillings with higher blood mercury levels, stillbirths and malformed infants:

> Blood mercury concentrations were also higher in subjects with amalgams than in those without. As with mouth air mercury levels, the differences in blood mercury concentrations may be attributed to the presence of dental amalgams. . . .
>
> [A] significant correlation was found between the history of stillbirths and mercury levels in both maternal and

> cord blood. Further, the occurrence of malformed infants in previous births correlated significantly with pre-natal blood mercury levels.

(A.274,275-76; Drs. Abraham et al., "The Effect of Dental Amalgam Restorations on Blood Mercury Levels", *Journal of Dental Research*, Jan. 1984, p. 71, at 72-73).

Dental amalgams also have been linked to higher mercury levels in the brain:

> [There is] a positive correlation between the number of occlusal [opposing] surfaces of dental amalgam and mercury levels in the brain.

(A.285,286; Drs. Eggleston & Nylander, "Correlation of Dental Amalgam with Mercury in Brain Tissue", *Journal of Prosthetic Dentistry*, Dec. 1987, p. 704, at 705).

In a scientific overview of the amalgam research as of 1985, 4 dental researchers drew some ominous conclusions:

> "1. The evidence indicates that amalgam surfaces release [toxic] mercury vapor into the mouth. . . .
>
> "4. The release of mercury from amalgam results in the deposition of mercury in body tissue and an increase in . . . [5] brain and urinary levels [of mercury]. . . .
>
> "6. The release of mercury from dental amalgams makes the predominant contribution to human exposure . . . in the general population."

(A.253,264-66; Drs. Clarkson et al., "The Prediction of Intake of Mercury Vapor from Amalgams", *Biological Monitoring of Toxic Metals*, pp. 257-59).

Other dental researchers have warned of the health hazards posed by dental amalgams:

> [M]ercury vapour concentrations in exhaled breath . . . appear high enough to be *a chronic toxological hazard for some people with numerous amalgam fillings*. . . .
>
> [T]he levels of elemental mercury in breath derived from silver-tin amalgam fillings represent *a significant and*

> *undesirable contribution to man's "normal" body burden of mercury.*

(A.289-90,297; Drs. Patterson et al., "Mercury in Human Breath from Dental Amalgams", *Bulletin of Environmental Contamination and Toxicology*, Apr. 4, 1985, p.459, at 459-60, 467; emp. added).

Other dental researchers have warned that mercury vapor levels from dental amalgams exceed internationally-recognized safe levels of mercury exposure:

> Hg [mercury] dosages from dental amalgams were as much as 18-fold the allowable daily limits established by some countries [18 times higher than the West German allowance and 1.8 times higher than the Russian allowance] for Hg exposure from all sources in the environment. . . . [T]he amount of elemental Hg released from dental amalgam *exceeds or comprises a major percentage of internationally accepted threshold limit values for environmental Hg [mercury] exposure.*

(A.281; Drs. Vimy & Lorscheider, "Serial Measurements of Intra-Oral Air Mercury: Estimation of Daily Dose from Dental Amalgam", *Journal of Dental Research*, Aug. 1985, p. 1072; emp. added).

Another dental researcher points out that mercury exposure from dental amalgams is similar to environmental exposure (chronic and affecting all population groups) and *often exceeds EPA limits*:

> [I]f amalgam related mercury exposure under special conditions is comparable to environmental exposure [which he concludes it is, A.213,226], then . . . [u]nder [common dental] conditions, high levels of mercury vapor exposure would persist and *the Environmental Protection Agency guidelines would be exceeded as a result of the presence of dental amalgams.*

(A.213,227-28; Dr. Svare, "Dental Amalgam Related Mercury Vapor Exposure", *National Institutes of Health Work-*

*shop on Biocompatibility of Metals in Dentistry*, July 11-13, 1984, p.35, at 48-49; emp. added).

Dental schools and dental societies have sponsored classes and conferences on the dangers of amalgam fillings. In 1986 the Boston University School of Dentistry offered a 2-day course whose syllabus recited in part:

> *As the clinical and scientific research discloses that mercury released from amalgam fillings penetrates the human body and can be detrimental to health, the assertions of amalgam toxicity keep intensifying. Nobody can prove amalgam safety because it is toxic. . . .*

(A.249,250; Boston Univ. Dental School, School of Contg. Dental Edn., Spring/Summer 1986, "Diagnosis and Prevention of Amalgam Intoxication"; emp. added).

That same year the Nassau, Queens & Suffolk County Dental Societies sponsored a now-famous symposium entitled:

"The Dental Amalgam Controversy . . .
To Use or Not To Use"

(A.251,252; Apr. 2, 1986). Its panelists covered the full spectrum of viewpoints, from Dr. Michael Ziff ("dental amalgam fillings are a health hazard to patients"; A.252), to Dr. Nelson Rupp for the ADA ("dental amalgam: an unusually safe biometal"; A.252).

* * *

In short, the conclusion is inescapable that there exists within dentistry a substantial controversy over the wisdom and safety of amalgam fillings and over whether they should be removed as a health hazard because of their disbursal of mercury (a known toxin) into the brain, lungs, and bloodstream as a result of friction within the mouth from chewing and brushing. A substantial body of scientific opinion supports the view, adopted by the petitioner, that amalgam fillings pose an unnecessary health risk and, in appropriate cases, should be removed—that "mercury released from amalgam fillings penetrates the human body and can be detrimental to health" (Boston Univ. Dental School Catalog, quoted more fully, this page *supra*).

**2. The Admissions of the Commissioner's Expert**

The Commissioner's expert effectively acknowledged a serious dispute over the safety of mercury-based amalgam fillings. Initially, the Commissioner's expert asserted that there was not even an issue as to the safety of amalgam fillings (A.98-99). Yet on cross-examination he admitted the depth of the controversy within the profession:

> Q: Now, was the title of the meeting that you spoke at on April 2, 1986 "The Dental Amalgam Controversy—To Use or Not to Use". . .?
>
> A: The title of the meeting I spoke at was the Greater Long Island Dental Society. That was the name of the meeting.
>
> Q: Was the title of the program, the full day scientific program debate that you spoke at, was it "The Dental Amalgam Controversy—To Use or Not to Use"?
>
> A: That was the name that the sponsors [3 Long Island Dental Societies] placed on the program.

(A.99). The Commissioner's expert further admitted that there were two sides to the issue:

> Q: You just said there were more than two sides to the question.
>
> What were the sides you were referring to and what was the question?
>
> A: *Well, certain people [within dentistry] allege that dental amalgam releases large amounts of mercury, which are harmful to patients and that it is toxic.*
>
> Other people [including myself] disagree with that.

(A.101; emp. added). The Commissioner's expert admitted to participating in 10 or more professional conferences where the safety of amalgam fillings was challenged:

> Q: Now, you indicated again about 10 to 12 places that you discussed or gave a talk on your position to do with the safety of dental materials; is that correct?

A: I did. . . .

Q: But there was somebody else who did on the same program discuss this and not agree with your findings to do with the mercury toxicity each time?

A: *There were people who presented points of view that advocated that dental amalgam was toxic to patients on those occasions.*

(A.105; emp. added).

The Commissioner's expert also acknowledged the scientific literature on the dangers of mercury-release from amalgam fillings. His admissions were numerous. On the correlation between amalgam fillings and mercury in urine, he admitted:

WITNESS: There was a study where the investigators used radioactive mercury and placed an amalgam [filling] in a patient.... The finding of radioactive mercury in the urine suggested that this mercury, through the placing of the amalgam or whatever, had entered the patient and was now exiting the patient in the urine.

(A.106). On the correlation between oral mercury and mercury levels in both blood and urine, the Commissioner's expert admitted:

Q: Do you know of any correlation between the levels of mercury, in the blood and urine and the mercury vapor in a person's mouth?

A: I haven't seen a study that did that, that correlated the levels that have been measured in the mouth with blood and urine. I think—wait a minute. I take that back. [Dr.] Svare's paper did do that.

The answer to the question is yes.

(A.107). On studies showing a correlation between amalgam fillings and mercury vapor in the mouth, the Commissioner's expert, while disagreeing, admitted:

Q: Are you aware of any studies that show that the mercury vapor level in the mouth is higher after chewing,

after considerable chewing, for patients with mercury amalgams in their mouth but not for patients without?

A: They both rise interestingly after chewing. . . .

Q: Does the study show 15 times the rise [for patients with mercury fillings than without]?

A: That's what the author claims. . . .

(A.108). The Commissioner's expert, while disagreeing, further admitted:

Q: Now in the [Dr.] Vimy paper . . . [he] concludes that the concentrations of mercury measured in the intraoral air was attributed to the rate and direction of air passage across the amalgam surface, and that when there was chewing in these subjects with the amalgam, it increased their concentration 54 times over levels observed in controlled subjects.

Are you familiar with that?

A: That's what he said.

(A.123). On studies showing a correlation between amalgam fillings and mercury in various body organs, the Commissioner's expert admitted:

Q: Are you familiar with any studies with regard to autopsies that have to do with the difference in the amount [of mercury] found in the various organs of the body between people who have amalgam fillings and those who do not have amalgam fillings?

A: I have heard of such studies. . . .

(A.109-10). On studies showing a correlation between amalgam fillings and mercury in the central nervous system, the Commissioner's expert, while disagreeing, admitted:

Q: Would you agree with the statement that mercury in the central nervous system can be related to the number of amalgam fillings?

A: I would disagree with that statement [con'd . . .].

Q: Have you been familiar with any studies which support that statement?

A: I am aware of several studies that make that allegation. . . .

(A.118-19). On studies showing that mercury released from amalgam fillings nearly equals or exceeds international safety standards, the Commissioner's expert, while again disagreeing, admitted:

Q: Are you aware of the study that was published in the *Journal of Dental Research* in August 1985 having to do with serial measurements of intraoral air mercury estimation of daily doses from dental amalgam? . . .

A: Yes, I am. . . .

Q: Now would you agree with this statement that they have in their article:

"The results demonstrate that the amount of elemental mercury released from dental amalgam exceeds or comprises a major percentage of internationally accepted threshold limit values for environmental mercury exposure"?

A: I wouldn't agree with that.

(A.121-22).

* * *

In short, the Commissioner's expert, while asserting the safety of amalgam fillings, and while disagreeing with the opposing experts, nevertheless acknowledged a substantial body of professional opinion in opposition to his own, both in the scientific literature and at professional conferences.

**B. The Petitioner's Reknown in the Field**

The petitioner has been one of the leading proponents of a ban on mercury-based amalgam fillings. He has been interviewed on radio talk shows (A.160-63,166), has appeared on television news shows (A.165), and has lectured at professional symposia and conferences (A.163-66,200-2).